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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 702

MONTE G. MASON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the State of California and District Court of Appeal, State of California, in and for the Second Appellate District, Division One.

RUSSELL E. PARSONS,
448 South Hill Street,
Los Angeles 12, California,
Attorney for Petitioner.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

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Petition for Writ of Certiorari to the State of California and District Court of Appeal, State of California, in and for the Second Appellate District, Division One.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Monte G. Mason, respectfully shows to this Honorable Court:

Summary and Short Statement of the Matter Involved.

By an Information filed on April 28, 1947, the petitioner was charged in two counts, One and Eight, with committing grand theft of the sums of $1.500.00 and $5,000.00 respectively, and in seven counts with violating the Corporate Securities Act in making unpermitted sale of stock to individuals for profit.

The petitioner waived trial by jury and on September 5, 1947, the Court found the defendant guilty as charged in the Information, except as to Count Two, in relation to a violation of the Corporate Securities Act. On September 26, 1947, the Court denied the defendant's application for probation, and sentenced him to the State Prison for the terms prescribed by law.

The judgment was appealed and affirmed in and reported in *People v. Mason*, 86 Cal. App. 2d 455, 195 P. 2d 60, on June 29, 1948.

The defendant re-applied for probation in the trial court after the affirmance of the judgment, and the trial court, on January 4, 1949, suspended the State Prison sentence and granted probation for a period of ten years with the provision that the defendant make restitution in the sum of not less than $300.00 per month, as determined by the Probation Department, along with the usual condition of probation.

In a supplemental report, filed on December 15, 1958, the Probation Officer advised the Court that the defendant had been indicted for violation of Corporate Securities Act and that he was at that time on trial in the Superior Court, in Los Angeles County, for similar offenses. The report further set forth that the probation period would expire January 3, 1959 (within eighteen days); that the defendant had continued to pay $300.00 a month toward a total restitution of $62,317.33, and still owed about $27,000.00; that it was recommended that probation be revoked partially and that the hearing on the violation of probation be continued to February 17, 1959, for further report, but that petitioner be ordered to continue to pay $300.00 per month restitution. On December 16, 1958, the de-

fendant was present in Court with counsel and the Court revoked probation and ordered a hearing on determination of the violation of probation for January 20, 1959, a date beyond the jurisdiction of the Court, and ultimately the case was continued to February 24, 1959.

In a second supplemental report, filed on December 16, 1958, but appearing in the transcript after the Court order of December 16, 1958, and it appears that it was not before the Court, December 16, 1958; the probation officer advised the Court that the jury had returned a verdict of guilty against the defendant for violation of the Corporate Securities Act and one count of grand theft. The Probation Officer recommended that defendant be found in violation of probation and that probation be revoked and sentence imposed.

On February 24, 1959, some fifty-three days after the Court lost jurisdiction within the ten year period to determine a violation of probation, the Court at that time found that the defendant had violated the condition of probation by his subsequent conviction and again revoked probation, imposed sentence, and ordered the original sentence imposed in full force and effect.

On February 25, 1959, the defendant filed Notice of Appeal from the judgment of February 24, 1959, and from the order revoking probation. On May 1, 1959, the defendant moved the Court to set aside the order and judgment of February 24, 1959, and further made a motion for Writ of Habeas Corpus, each of which was denied by the trial court.

On direct appeal, the defendant raised the constitutionality under the Due Process of Law Clause that the order of probation to pay not less than $300.00 a month restitution as "to be determined by the Probation De-

partment" was in excess of the Court's jurisdiction and void; that the Court Order of December 16, 1958, revoking probation, was void for failure to set forth the cause of revocation of the probation; that the Trial Court's Order of February 24, 1959, in determining the cause for revocation of probation and placing the State Prison sentence into full force and effect, was in excess of the Trial Court's jurisdiction, for the maximum term of probation had expired without valid order of suspension or revocation of probation.

The California Reviewing Court erroneously held that:

> "Even if the condition to make restitution and to pay not less than $300.00 per month on such account was void (and we do not think that it was so void), it would not necessarily mean that the entire order of probation was void."

The Court then states: "Conditions not authorized by law are severable from and do not affect the valid conditions of the order."

The Court then states that the defendant was obviously satisfied with the condition of probation, as he did not complain during the ten years and payment of $300.00 per month to the Probation Department, and that his silence would indicate that, in his opinion, the order was proper and that he was satisfied.

The Reviewing Court then presumed that the Trial Court had in mind the claims involved by all the persons who claimed to be swindled by the defendant, and thus there is a presumption that the Trial Court performed official duty and that the proceedings ordering unlimited restitution had been regular; and that it has

been held that cases involving the Corporate Securities Act are proper ones for restitution. The Court then quotes from "*In re Martin*, 82 Cal. App. 2d 16, 19, 185 P. 2d 645, wherein it was held that a defendant may not apply for, consent to and take advantage of favorable terms of probation, even though he was not lawfully entitled thereto, and then, after probation has been duly revoked for violation thereof, challenge, for the first time, on Habeas Corpus, the right of the Court to pronounce sentence, since the time was extended at his request. That would result in a travesty of justice." (You said, unquote, but I don't know where the quote started.)

The Reviewing Court, in answering the defendant's contention "that the revocation of probation was in excess or beyond the jurisdiction of the Court in the order of December 16, 1958, for failure to determine the "cause" for the order of revocation of probation, the hearing thereof extended to a time beyond the expiration date of said probation, at which time a subsequent order was made after a finding by the Court that the defendant had violated the conditions of probation, and on February 24, 1959, again revoked probation and placed into full force and effect the original State Prison sentence pronounced some twelve years prior to said order"; said that under such circumstances the defendant was not entitled to notice or hearing as neither is a constitutional or a statutory right preceding revocation of probation. The Reviewing Court went on to say that, if a hearing is held, it is governed by the rules concerning criminal trials; that the Trial Court may revoke probation solely on the basis of a Probation Officer's report; there is no right to present

witnesses, and that the constitutional right to have counsel in criminal prosecution is not applicable, since a probation proceeding is not a prosecution. The Court then cities *In re Davis,* 37 Cal. 2d 872; 873, 236 P. 2d 579, wherein it is held:

> "We are satisfied that neither the Constitution of the United States nor that of California precludes ex parte revocation of probation."

The Court recognizes the jurisdictional date is the time of revocation of probation and disregards the order made after the expiration period of probation on February 24, 1959, at which time the Court made a determination that the defendant violated the conditions of probation, revoked probation and placed into full force and effect the judgment and sentence to the State Prison made some twelve years prior thereto, and relied upon the order made on December 16, 1958, at which time the Court merely revoked probation and set the hearing for determination of the cause of probation, upon recommendation of the Probation Officer, at a time beyond the jurisdiction of the court, without invoking the original judgment and sentence involved. The Court arrived at this conclusion by stating that the Trial Court could take judicial notice of the public record that the defendant two days previous thereto had been convicted, by verdict of the jury, of new criminal offenses, and that there is no reason to believe that there was any irregularity in the proceedings, for the presumption is to the contrary, citing Code of Civil Procedure Section 1963, subdivision 15.

The Reviewing Court then makes reference to defendant's motion made after judgment while the case was pending on appeal in relation to the order of Feb-

ruary 24, 1959, at which time the Trial Court made a second determination of revocation of probation and placed into full force and effect the original judgment and sentence pronounced some twelve years prior thereto, holding that the Trial Court had no jurisdiction over the subject matter of the judgment as jurisdiction was then in the Reviewing Court on direct appeal.

The Reviewing Court concludes its opinion by stating that the probation in question was revoked on December 6, 1958, well within the unexpired time limit, and find no error in the record, affirming the judgment of conviction. (The facts heretofore set forth are taken from the Reviewing Court's opinion reported in *People v. Mason,* 184 A. C. A. 201, through p. 212.)

Opinion Below and Basis of Jurisdiction to Issue Writ of Certiorari.

This is a California State Court criminal conviction involving a substantial Federal question erroneously decided by the State Reviewing Court in the case reported as *People v. Mason,* 184 A. C. A. 201, opinion rendered on August 26, 1960, with Petition for Hearing denied in the highest Court of the State, the California Supreme Court, on September 28, 1960, reported in the Minutes of 5 A. C., page 2 of Minutes; the time for filing Petition for the Writ of Certiorari was extended to February 15, 1961, by Order of this Honorable Court; that all available State Court remedies have been exhausted to bring the case within the provisions of Rule 22(1) of the Rules of this Honorable Court, 28 U. S. C. Section 1257(3) of the Judicial Code of the United States; the Fourteenth Amendment to the Constitution of the United States.

FEDERAL QUESTIONS PRESENTED.

I.

Was It a Violation of the Due Process of Law Clause of the Fourteenth Amendment in Ordering the Petitioner to Pay Over $28,500.00 Restitution to the Purchasers of Valid Securities Along With Non-Victims Not Named in the Criminal Accusation and the State Court's Refusal to Order the Unlawful Overpayment of Restitution Returned to Petitioner?

The Trial Court's original order of restitution of "not less than $300.00 per month" as "to be determined by the Probation Department" was only valid for a total sum of $1,500.00 and $5,000.00 claimed by the victims of the two theft charges of the accusation; that the purchasers of securities, sold by the petitioner without a State permit in violation of the California Corporate Security Act, had no valid claim against petitioner for return of the purchase price without return of the securities; that non-victims of the accusation had no valid claim for restitution and it is a violation of the Petitioner's right to due process of law to deprive him of his property of over-payment of $28,500.00 without a hearing as to their validity. The State Reviewing Court transgresses the due process clause of the United States Constitution, as aforesaid, in holding that Petitioner's silence waives his constitutional right to return of his legal and rightful property. (*People v. Mason*, 184 A. C. A. 201.)

II.

The Order of the Trial Court, on December 16, 1958, Revoking Probation Without Cause and Extending the Time for Hearing of the Cause of Violation of Probation Beyond the Jurisdiction of the Court, and the Order of February 24, 1959, Revoking Probation and Placing in Full Force and Effect an Expired Suspended Ten (10) Year State Prison Sentence, Is a Direct Violation of the Due Process of Law Clause of the Fourteenth Amendment to the Constitution of the United States.

It is conceded by the respondent that the maximum term of the suspended sentence and probation period was ten (10) years, the expiration date of January 3, 1959; that upon the written recommendation of the Probation Officer of a partial revocation of probation (requiring continuation of $300.00 monthly payments of restitution through the Probation Department), for the sole purpose of retaining jurisdiction of the case, the Court, on December 16, 1958, without stating the cause therefor, revoked probation and extended the hearing of the cause for revocation beyond the probation and expiration date, January 3, 1959, of the jurisdiction of the Court, without ordering into full force and effect the suspended State Prison sentence theretofore pronounced and rendered over eleven (11) years prior thereto, on November 7, 1947.

The Reviewing Court has disregarded the Trial Court's order made on February 24, 1959, after the expiration date of probation of January 3, 1959, deter-

mining the cause of violation of the conditions of probation, re-revoking probation and placing in full force and effect the original suspended State Prison sentence, and, erroneously and in violation of the aforesaid constitutional rights of the Petitioner, holds, on the last page of its opinion, that (see Opinion *People v. Mason*, 184 A. C. A. 201-212, 7 Cal. Rptr. 525):

> "It is clear that the probation in question was revoked on December 16, 1958, well within the unexpired time limit.
>
> "We find no error in the record. The judgment of conviction is affirmed." (*People v. Mason*, 184 A. C. A. 201, 212.)

The California Reviewing Court, in its efforts to give validity to the order of revocation of probation of December 16, 1958, has voided the subsequent order of February 24, 1959, determining the cause of the violation; the re-revocation; the order placing into effect the original judgment and sentence to the State Prison, and the judgment-committment issued thereon under which Petitioner is imprisoned, confined and restrained in the State Prison, and said order of December 16, 1958, remains void and in violation of said due process of law clause, in that the order of revocation of probation was made in excess of the Court's jurisdiction without cause (which cause was ordered determined at a time beyond the expiration date of the Court's jurisdiction), and without order of enforcing into full force and effect the original judgment and sentence pronounced and rendered November 7, 1947.

It is a further deprivation of said constitutional rights of the Petitioner for the Reviewing Court to affirm the judgment ordered into full force and effect on February 24, 1959, under which the Petitioner is imprisoned, confined and restrained, while recognizing such order, judgment-commitment was made and issued beyond the period of probation and the Trial Court's jurisdiction. (*People v. Mason*, 184 A. C. A. 201, 7 Cal. Rptr. 525.)

III.

Manner in Which Federal Question Was Raised.

The Federal question was raised in the State Reviewing Court on appeal and treated as a Federal question in the Court's opinion. (*People v. Mason*, 184 A. C. A. 201, 206-212.) Also in Trial Court on motion to vacate judgment.

IV.

Reasons Relied on for Allowance of the Writ.

The California Reviewing Court (and the California Supreme Court, by declining to grant a Petition for Hearing), have decided an important question of constitutional law which has not been, but should be, settled by this Honorable Court. Under the mandate of the due process clause of the Fourteenth Amendment to the United States Constitution, the State Courts are required to apply the procedural standard of fairness, impartiality and decency in each and every trial or proceeding involving the life, liberty or property of an

accused. All the above and more has been denied to the Petitioner by the California Courts.

The California State Courts have decided a Federal question of substance and have decided it in a way probably not in accord with applicable decisions of this Honorable Court, the Supreme Court of the United States. It is submitted that these reasons call for exercise of this Honorable Court's jurisdiction and power of review by the issuance of the Writ of Certiorari, as the Petitioner has exhausted all adequate State remedies.

That because of the matters hereinbefore set forth and as established by the record, the Petitioner here and now specially sets up, pleads and relies upon the aforesaid constitutional guarantees for his protection against the wrongs of respondent.

ARGUMENT.

I.

The Trial Court's Order of Restitution Has Deprived the Petitioner of $28,500.00 Personal Property in Violation of Due Process of Law.

The California Reviewing Court refers to the condition of probation that:

> ". . . Defendant must make restitution for all claims as directed by the Probation Department in the sum of not less than $300.00 per month. Any default of this sum is to be reported to the Court by the Probation Department."
>
> *People v. Mason,* 184 A. C. A. 201, at 205, 7 Cal. Rptr. 525.

The Reviewing Court then goes on in its opinion to state that:

> "Defendant asserts that the order of probation was lacking due process for the reason that the probation officer and not the Court set the amount which the defendant was to pay his victims. Defendant asserts that this Court should order the Probation Department to return to him substantially all the sums which he has paid to the Probation Department for restitution to his victims." (184 A. C. A. 201, at 206, *supra.*)

The Reviewing Court then said that even if such order of restitution was void "(and we do not think that it was so void)", it would not necessarily mean that the entire order of probation was void and was severable from and did not affect the valid conditions of

probation; that petitioner over the ten year period paid $300.00 per month without objection to the end that he would not have to go to prison as theretofore ordered, and that his silence was an indication that the payments were proper and that he was satisfied.

The Court continued on to hold and apply the statutory civil doctrine of "presumption that official duty has been regularly performed and that the proceedings have been regular", (citing Section 1963, subd. 15 of California Code of Civil Procedure); and that it has been held that cases involving violation of the Corporate Security Act are proper ones for restitution; that an accused cannot consent to and take advantage of favorable terms of probation and upon revocation thereof claim, on Habeas Corpus, the Court has no jurisdiction to pronounce sentence (citing *In re Martin*, 82 Cal. 2d 16, 19.)

At once it may be said that the Legislature has both limited and restricted the powers of the Court in the granting or withholding probation (Penal Code of California, Section 1203), and when the Court fails, as it did here, to follow the statutory requirements, such order is void in either that the Court lacked or exceeded its jurisdiction. (*People v. Wade*, 53 Cal. 2d 322, 338.)

The one and only State statute relating to restitution is the clause buried in the verbiage of Section 1203.1 of the California Penal Code pertaining to or-

der of probation, terms and conditions, service of sentence, modification, etc., as follows:

"... May provide for reparation in proper cases; ..." and,

in all cases of probation the Court is authorized to require as a condition of probation that the probationer go to work and pay any "... reparation condition ..."; that the Court may impose any or all of the mentioned conditions or:

> "... other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to *any person resulting from such breach* ..." (Emphasis added.)

The Legislature, in providing for the payment of reparation as an order of probation, has limited payment thereof to the complainant for the injury done resulting from the "breach" of the law for which the accused is prosecuted in order to comply with the constitutional mandate that a citizen's life, liberty or property shall not be forfeited without due process of law. The State statute is so clear that it may be disregarded but not misinterpreted.

The Federal statute, Title 18 U. S. C. A., Section 3351, like the State statute, limits the Court's order of restitution, in granting probation, to the victim named in the indictment. (*United States v. Stoker* (1952), 196 Fed. 276.)

In the sale of securities without permit, in violation of the California Corporate Act, it is the State that is offended and not the purchaser of securities, and certainly the purchaser cannot keep both the valuable security, as in the present case, and also collect restitution from the accused, for the victim would then become the thief and the accused the victim of unconstitutionally forfeited personal property in violation of the due process of law.

The restitution of $6.500.00 to the victims of the two counts of theft may be valid, although the Trial Court's order was indefinite, uncertain and left much room for abuse in allowing the Probation Department to perform a judicial function in determining the amount of restitution and to whom it should be paid.

It is the petitioner's contention that of the $36,-000.00 paid as restitution, he is entitled to return of either the securities or some $28.000.00, ordered forfeited without due process of law, for in *Shelly v. Kramer*, 334 U. S. 1, at page 16, the Court said that no department of Government may exercise unrestrained or arbitrary power and State power must be exerted within the limits of the constitutional provisions.

II.

The Trial Court's Orders of December 16, 1958, and February 24, 1958, Revoking Probation and Enforcing the Previously Suspended State Prison Sentence, Are in Violation of Due Process of Law Clause of the Fourteenth Amendment.

At the hearing on violation of probation, on December 16, 1958, the Court had before it the Probation Officer's report recommending a partial revocation of probation, for it was recommended to the Court that the maximum term of probation would expire on January 3, 1959, some sixteen days; that probation be revoked, except the condition that Petitioner continue to pay $300.00 per month through the Probation Department and that the hearing on the probable violation be continued beyond the expiration date. The Court, following said recommendation, revoked probation and continued the matter for hearing for the cause of the revocation beyond the maximum probation period and jurisdiction of the Court, without invoking in full force and effect the suspended State Prison sentence.

The Reviewing Court has obviously recognized the order of February 24, 1959 as being beyond the Court's jurisdiction, and void, for the Reviewing Court's determination is that:

> "It is clear that the probation in question was revoked on December 16, 1958, well within the unexpired time limit." (*People v. Mason, supra*, at 212 of 184 A. C. A.)

The Reviewing Court arrives at its determination by relying on *In re Davis,* 37 Cal. 2d 872, 873, and *In re Levi,* 39 Cal. 2d 41, 44, where the California Supreme Court held:

> "There is neither a constitutional nor a statutory right to a hearing preceding revocation of probation."

What the Reviewing Court overlooked in the order of December 16, 1958, is that no "cause" was stated to support the order of revocation and the Court's failure to order into force and effect the suspended sentence.

The State Reviewing Court recognizes that the order of February 24, 1959, was beyond the expiration date or probation of January 3, 1959, and void in holding:

> "It is clear that the probation in question was revoked on December 16, 1958, well within the unexpired time limit." (*People v. Mason,* 184 A. C. A. 201; at 212.)

The State Court, in arriving at the above determination, relies upon *In re Davis,* 37 Cal. 2d 872, 873, and *In re Levi,* 39 Cal. 2d 41, 42, holding that the Federal Constitutional Due Process Clause of the Fourteenth Amendment does not require a hearing before revocation of probation.

Such is not and cannot be the law, for Sections 1203 and 1204 of the California Penal Code provide for the suspension of probation with re-confinement of the probationer or if he is not in custody or in the jurisdiction of the Court, the suspension, without revocation, in a proper case stays the running of the probation until such time as the Court may gather all

the facts of the alleged violation and have the probationer within the jurisdiction before the Court for determination of the accusation of violating the conditions of probation before revocation and infliction of punishment, at which time both The People and the probationer may present evidence by witnesses in mitigation or aggravation of punishment by the statutory mandate of Section 1204 of the Penal Code, which statute fulfills the dominant requirement of the due process clause to notice of the wrongful act or omission, the presence of the accused in Court to controvert, by testimony of witnesses, the accusation against him.

The State Reviewing Court, like the California Supreme Court, in the *Davis* and *Levi* cases, *supra,* finding that Section 1204 of the Penal Code was so clear it could not be misinterpreted, ignored it completely in the present case.

In *People v. Valdivia* (June, 1960), 182 A. C. A. 165, the First District Court of Appeal of California, Division Two, considered Section 1204, *supra*, and held it was mandatory. The Court also held that facts outside the record cannot be considered on appeal, citing *People v. Sorrentino*, 146 Cal. App. 2d 149, 157, 303 P. 2d 859.

In the present case, contrary to Section 1204, *supra*, and the *Valdivia* case, *supra*, the Reviewing Court refers to a supplemental probation report in which the Trial Court was told of petitioner's trial and that he had been found guilty of the charges in another case. This report appears in the record on appeal on the page following the Court's Order of Revocation, and there is nothing to indicate that it was before the Court at the time of revocation or it would have made

some mention of it at that time in its order of revocation of probation.

The holding of the Reviewing Court that the Trial Court could take judicial notice of the public record of the above said trial and verdicts of guilty runs counter to the principle of law expressed time and time again that matters outside the record will not be considered on appeal. The petitioner having established the deprivation of due process of law, there can be no presumption of regularity of the proceeding of December 16, 1959.

The Reviewing Court, in citing the *Davis* case, *supra*, as authority for affirming the judgment, has overlooked the fact that the California Supreme Court there held, as in many other cases, that before an order revoking probation is valid, *the order must state the cause of the revocation of probation.*

In the case of *In re Clark* (1959), 51 A. C. 840, 841, it was held that unless the Trial Court had jurisdiction from the facts before it—*legal cause*, the Court was without jurisdiction to change the conditions of probation.

The California Parole law also requires there must be cause before there can be a revocation of parole, which cause must be set forth in the order of revocation. (Sec. 3063, Calif. Penal Code; *In re McLain* (Dec. 1960), 55 A. C. 78, at p. 87.)

The Reviewing Court, on page 210 of the printed opinion, citing *People v. Williams*, 24 Cal. 2d 848, 854, recognizes the jurisdictional fact is the timely revocation of probation.

The Trial Court's Order of December 16, 1958, cannot stand, for it commands nothing more than the uncertain revocation of probation without determination of the cause for revocation and without placing in full force and effect the suspended State Prison sentence. The jurisdictional period of time having elapsed for correction of the deficiency of the order of December 16, 1958, and as the Petitioner is held under order, judgment and commitment of February 24, 1959, concededly void as beyond the jurisdiction of the Trial Court, the judgment of the said State Court should be reversed.

The applicability of the law to the conceded facts, as appearing herein, is a question of law, so held in *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373, 376; *Estate of Madison*, 26 Cal. 2d 453, 456.

Prayer

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be issued that the judgment of the said State Court be reversed by this Honorable Court; and that the Petitioner may have such other and further relief as seems just and proper.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1960

Appendix to Petition for Writ of Certiorari to the State of California, District Court of Appeal, State of California, for the Second Appellate District, Division One.

APPENDIX.

Opinion of the District Court of Appeal.

[Crim. No. 6747. Second Dist., Div. One. Aug. 26, 1960.]

The People, Respondent, v. Monte G. Mason, Appellant.

Appeals from a judgment of the Superior Court of Los Angeles County and from order revoking probation and denying motion to set aside the judgment. Herbert V. Walker, Judge. Judgment affirmed; appeals from orders dismissed.

Prosecution for grand theft and for violation of the Corporate Securities Act. Judgment of conviction affirmed.

Russell E. Parsons and Edward I. Gritz for Appellant.

Stanley Mosk, Attorney General, and Norman H. Sokolow, Deputy Attorney General, for Respondent.

Fourt., *J.*—This is an appeal from the judgment, an attempted appeal from an order revoking probation filed on February 25, 1959, and an attempted appeal from an order denying a motion to vacate and set aside a judgment entered on February 24, 1959.

In an information filed in Los Angeles County on or about April 28, 1947 (Case No. 112872), Mason was charged in two counts (I and VIII) with committing grand theft of the sums of $1,500 and $5,000 respectively, and in seven counts with violating the Corporate Securities Act in making unpermitted sales of stock to individuals for profit.

In a trial which started before Judge Landreth on September 5, 1947, the defendant was found guilty as charged with the exception of Count II which had to do with an alleged violation of the Corporate Securities Act.

The defendant made an application for probation and the hearing on the application and the pronouncement of judgment and sentence was set for September 26, 1947. The probation officer made an investigation and report and recommended that the application for probation be denied.

The probation officer commented in his report as follows: ". . . he appears to have been playing on the fringes of law violation over a period of several years. It is without a doubt that he is a capable man, has a good personality, is in all probability a hard worker and is possessed of many other favorable traits and abilities, but it appears that he has been living far beyond his means and has been doing so by securing and receiving money from people without giving value received. The defendant expresses no remorse for his activities and it appears that he has no means of making restitution."

Probation was denied and Judge Landreth, who heard the case sentenced the defendant to the state prison on November 7, 1947.

The judgment was appealed to this court and was affirmed in People v. Mason, 86 Cal. App. 2d 445 [195 P. 2d 60] on June 29, 1948.

The defendant reapplied for probation in the trial court after the afifrmance of the judgment. Judge Ambrose of the trial court permitted the application to

be made and the hearing was set for September 28, 1948. In the report of the probation officer at that time it is set forth that the defendant had ". . . presented a written statement attached hereto in which he has covered some of the points covered in the above paragraph and in addition states, 'My brother-in-law has offered to loan me from $500 to $1000 per month to pay on these accounts until fully paid. I have explained the situation to him and he is willing to help, starting immediately.'"

That report further stated ". . . it appears to the Probation Officer that he has not satisfactorily explained sufficient income from all sources to have taken care of the financial obligations that he has apparently met recently and for the past year. It is true that he has now presented a plan of restitution but only through intangible and imaginary income possible if all of his dreams come true. The defendant now expresses some remorse over his former activities but in the next breath justifies his actions. The greatest reason for considering probation in this matter would be for a matter of restitution and this possibility is so remote that it almost seems improbable if not impossible." The probation officer recommended that probation be denied.

At the hearing on January 4, 1949, before Judge Ambrose the judge ordered that the sentence to the state prison pronounced on November 7, 1947, be suspended and the defendant was granted probation for a period of 10 years under the conditions, among others, that ". . . Defendant must make restitution for all claims as directed by the Probation Department in the sum of not less than $300 per month. Any default of this sum is to be reported to the Court by the Probation Depart-

ment. The defendant must follow the usual conditions of the Probation Department."

In a supplemental report (dictated on December 11, 1958) filed on December 15, 1958, the probation officer set forth that the court had theretofore been advised (*i.e.* on July 1, 1958) that the defendant had been indicted in San Luis Obispo County for violating the Corporate Securities Act and that he was at that time on trial in the Superior Court in Los Angeles County (Case No. 197622) for similar offenses. The report further set forth that the probationary period would expire January 3, 1959; that the defendant had continued to pay $300 a month toward a total restitution of $62,317.33 and then owed about $27,000. It was recommended by the probation officer that probation be revoked and the hearing on the violation be continued to February 17, 1959, for further report.

In another supplemental report (dictated on December 15, 1958), filed on December 16, 1958, the probation officer advised the court that the jury had brought in a verdict of guilty on December 14, 1958 (Case No. 197622) on the charges set forth in the information filed in Los Angeles County, namely grand theft of $15,000 and seven counts of violating the Corporate Securities Act and a conspiracy charge. The probation officer recommended that "defendant be found in violation of probation, that probation be revoked and sentence imposed." On December 16, 1958, the defendant was present in court with his counsel and Judge Ambrose revoked the probation. Hearing on the violation was continued to January 20, 1959, and ultimately to February 24, 1959. On February 24, 1959, Judge Walker ordered that "probation is revoked" and sen-

tenced the defendant to the state prison on all counts in Case Number 112872, the sentences to run concurrently with the sentences imposed in Case Number 197622.

On February 25, 1959, the defendant filed a notice of appeal from the judgment (of February 24, 1959) of conviction and "from the Order revoking probation."

On May 1, 1959, the appellant moved the court to set aside the order and judgment of February 24, 1959, and further made a motion for a writ of habeas corpus. Each such motion was denied.

Appellant has attempted to appeal from the order of May 1, 1959, denying the motion to set aside and vacate the judgment.

Appellant now contends: (1) The court was without jurisdiction to order unlimited restitution to be paid through the probation officer at not less than $300 per month as a condition of probation; (2) The court exceeded its jurisdiction by revoking probation and ordering the suspended sentence in full force and effect after the expiration of the full term of the judgment and sentence originally pronounced; (3) The court erred in denying the defendant's motion made after judgment to set aside the void order revoking probation and ordering the original judgment and sentence into full force and effect.

The appellant asserts that the order of probation was lacking in due process for the reason that the probation officer and not the court set the amount which the defendant was to pay to his victims. Defendant asserts that this court should order the probation department

to return to him substantially all of the sums which he has paid in to the probation department for restitution to his victims. Even if the condition to make restitution and to pay not less than $300 per month on such accounts was void (and we do not think that it was so void) it would not necessarily mean that the entire order of probation was void. Conditions not authorized by law are severable from and do not affect the valid conditions of the order. (People v. Ramos, 80 Cal. App. 528 [251 P. 941].)

The condition imposed in this case was obviously satisfactory to the defendant until the time of his conviction in the proceedings in Case Number 197622. He never complained of the order to make the payments and he did make the payments as indicated which he himself in effect proposed to the end that he would not have to go to the state prison as the court had theretofore ordered. Furthermore, the trial court, during the time of probation, upon a proper showing, is authorized to modify the order granting probation. Had the defendant been of the mind that the payments he was making were not entirely correct he should have made a showing during the 10-year period to that effect. His silence and the making of the payments would indicate that in his opinion the order was proper and that he was satisfied. The order of probation should be considered not by itself but as a part of the entire record. (People v. Marin, 147 Cal. App. 2d 625, 627 [305 P. 2d 659].) At the time the court heard the defendant's motion on reapplication for probation there were on file reports of the probation officers which indicated that various persons who had been swindled by the defendant had claims in excess of $62,700 and that

defendant had indicated he could secure from relatives loans of $500 to $1,000 per month to apply on the accounts until the same were paid. We presume that the court had in mind the claims involved and set a minimum amount to be paid each month toward restitution. There is a presumption that official duty has been regularly performed and that the proceedings have been regular. (People v. Wilkins, 169 Cal. App. 2d 27, 30 [386 P. 2d 540]; Code Civ. Proc., §1963, subd. 15.) It has been held that cases involving the Corporate Securities Act are proper ones for restitution. (People v. Sidwell, 27 Cal. 2d 121, 129-130 [162 P. 2d 913]; People v. Lippner, 219 Cal. 395, 397-400 [26 P. 2d 457].)

In In re Martin, 82 Cal. App. 2d 16, 19 [185 P. 2d 645], the court appropriately stated:

"The defendant may not apply for, consent to and take advantage of favorable terms of probation, even though he was not lawfully entitled thereto, and then, after probation has been duly revoked for violation thereof, challenge, for the first time, on habeas corpus, the right of the court to pronounce sentence, since the time was extended at his request. That would result in a travesty of justice."

Considering next the appellant's contention to the effect that the court exceeded its jurisdiction by revoking the probation and ordering the suspended sentence in full force and effect, appellant seems to believe that the court exceeded its jurisdiction on December 16, 1958, when it revoked the probation because as he now states there was no determination then made whether probation had been violated; he further asserts that a revocation is invalid when not based on a finding that there

was a violation of its terms and when the hearing thereon is put over at the suggestion of the probation officer to a time beyond the expiration date of the probation. Sections 1203.2 and 1203.3 of the Penal Code are in part set forth in the footnote.[1]

It was said in In re Levi, 39 Cal. 2d 41, 44 [244 P. 2d 403] as follows:

"There is neither a constitutional nor a statutory right to a hearing preceding revocation of probation. (In re Davis, 37 Cal. 2d 872, 873-874 [236 P. 2d 579].) If a hearing is held, it is not governed by the rules concerning formal criminal trials. The court may revoke probation solely on the basis of the probation officer's report. (In re Dearo, 96 Cal. App. 2d 141, 143 [214 P. 2d 585].) There is no right to pre-

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[1]Section 1203.2:

"At any time during the probationary period of the person released on probation in accordance with the provisions of these sections, any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, rearrest any person so placed on probation under the care of a probation officer, and bring him before the court, or the court may in its discretion issue a warrant for the rearrest of any such person and may thereupon revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life. Upon such revocation and termination the court may, if the sentence has been suspended, pronounce judgment after said suspension of the sentence for any time within the longest period for which the defendant might have been sentenced, but if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence, less any credits herein provided for. If probation has been revoked either before or after judgment has been pronounced, the order revoking probation and the judgment,

sent witnesses. (People v. Hayden, 99 Cal. App. 2d 97, 99 [221 P. 2d 221].) The constitutional right to have counsel in 'criminal prosecutions' (art. I, §13) is not applicable since a probation proceeding is not part of a 'prosecution.' (In re Dearo *supra*, 90 Cal. App. 2d 141, 143; People v. Fields, 88 Cal. App. 2d 30, 33 [198 P. 2d 104].)"

And, in In re Davis, 37 Cal. 2d 872, 873 [236 P. 2d 579] it is said:

"We are satisfied that there is neither a constitutional nor a statutory right to notice and hearing preceding revocation of probation. The federal Constitution does not give such a right. (Escoe v. Zerbst, (1935), 295 U. S. 490, 492 [55 S. Ct. 818, 79 L. Ed. 1566].) And we do not believe that section 13 of article I of our

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if any, may be set aside for good cause upon motion made before pronouncement of judgment or, if judgment has been pronounced, within 30 days after the court has notice that execution of the sentence has commenced. If an order setting aside the judgment or the revocation of probation or both is made after the expiration of the probationary period, the court may again place the defendant on probation for such period and with such terms and conditions as it could have done immediately following conviction. [Added by Stats. 1935, p. 1709; Am. Stats. 1957, ch. 331, §1.]"

Section 1203.3:

"The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. It may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held, but no such order shall be made without written notice first given by the court or the clerk thereof to the proper probation officer of the intention to revoke, modify, or change its order, and in all cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be by the court discharged subject to the provisions of these sections. [Added by Stats. 1935, ch. 604, p. 1709, §4; Am. Stats. 1937, ch. 511, p. 1501, §2.]"

state Constitution should be held to give petitioner a greater right in this respect than he is accorded under the federal Constitution, for under our law, as under the federal law, probation is not a right but a privilege (see People v. Williams (1944), 24 Cal. 2d 848, 855 [151 P. 2d 244]; Escoe v. Zerbst, *supra*). Unlike the federal statute, which contains the mandatory provision that a rearrested probationer 'shall' be taken before the court (18 U. S. C. A. §3653; Escoe v. Zerbst, *supra*, p. 493 of 295 U. S.), our statute provides that he 'may' be taken before the court (Pen. Code, §1203.2).

". . . . . .

". . . We are satisfied that neither the Constitution of the United States nor that of California precludes ex parte revocation of probation.

"We have also concluded that, in the absence of express statutory procedural regulations, the administration of justice is better served by permitting ex parte revocation of probation than by absolutely requiring notice and hearing. Factual situations presented in People v. Williams (1944), *supra*, 24 Cal. 2d 848, and People v. O'Donnell (1918), *supra*, 37 Cal. App. 192, illustrate the evils which could accrue from that requirement. In such cases, if notice and opportunity to be heard were required, a probationer who was imprisoned in another state or who evaded arrest or service of notice until the period of his probation had expired would pass beyond the jurisdiction of the court to impose sentence or to require execution of a previously suspended sentence, even though he had shown that he was not a fit subject for probation."

Where probation is revoked during the term of probation, as was done in this case, the defendant may, if

he has not previously been sentenced, be brought into court after the term of probation has expired and be sentenced. (People v. Hunter, 42 Cal. App. 2d 87 [108 P. 2d 472]; People v. Williams, 24 Cal. 2d 848 [151 P. 2d 244]; People v. Tibbits, 60 Cal. App. 2d 335 [140 P. 2d 726]; People v. Brown, 111 Cal. App. 2d 406 [244 P. 2d 702]; People v. Broes, 159 Cal. App. 2d 1 [323 P. 2d 200].) Where the judgment had been pronounced and then suspended upon the granting of probation, probation may be revoked without notice and the defendant ordered committed according to the terms of the judgment. (In re Dearo, 90 Cal. App. 2d 141 [214 P. 2d 585].)

In the case of People v. Hunter, *supra*, 42 Cal. App. 2d 87, the term of probation expired on May 9, 1939. On May 1, 1939, the court made an ex parte order revoking probation, based upon the report of the probation officer and defendant's violation of the rules. The hearing on the violation took place on April 8, 1940, following which the defendant was sentenced. The court said among other things at pages 91-92 that:

"The authority to revoke a person's probation does not even depend upon his violation of the specific conditions of the probation. The order suspending his sentence may be set aside if the court has reason to believe from the report of the probation officer, or otherwise that he is associating with lawless or improper persons or that he is engaged in criminal practices. (In re Young, 121 Cal. App. 711 [10 P. 2d 154]; People v. Fields, 131 Cal. App. 50 [20 P. 2d 988].) Upon the revocation of his probation, defendant stood before the court guilty of his crimes. He had failed to re-establish himself as a worthy citizen of the state. It was the

duty of the court to sentence him to a penal institution. The fact that defendant was committed at a time subsequent to the expiration of the period of his probation is immaterial. His probation had been revoked prior to the expiration of the probationary term. The court having found no reason to vacate the order of revocation, it was valid notwithstanding the fact that appellant was not present at the time of its entry on May 1, 1939. (Sullivan v. Superior Court, 185 Cal. 133, 139 [195 P. 1061].) We see no reason to interfere with the exercise of its discretion by the trial court."

The jurisdictional fact is the timely revocation of probation. (People v. Williams, *supra*, 24 Cal. 2d 848, 854.)

The court in this case by supplemental reports of the probation officer was told of the defendant's trial and of his having been found guilty of the charges in Case Number 197622. The conviction of the defendant of the charges in the case last mentioned was a matter of public record at least one day before the order of revocation was made. The defendant was in court with his attorney on December 16, 1958, and each of them knew that the jury in Case Number 197622 had returned a verdict of guilty on the charges set forth in that case, with the exception of one count on December 14, 1958. Certainly the conviction of the charges warranted the revocation of the probation. There is no reason to believe that there was any irregularity in the proceedings. Indeed there is the presumption to the contrary. (Code Civ. Proc., §1963, subd. 15.)

The last of the appellant's contentions is that the court erred in denying defendant's motions made after judgment to set aside the order revoking probation.

As heretofore noted, defendant appealed from the judgment ordered on February 24, 1959. The notice of appeal from that judgment was filed on February 25, 1959. It was on May 1, 1959, that defendant made his motion "to set aside and vacate that order and judgment made and entered herein on February 24, 1959, which said order revoked probation theretofore granted and put into full force and effect a judgment theretofore rendered . . ." As an alternative the defendant requested in effect that if the motion was denied that the application be considered a petition for a writ of habeas corpus. The motion and the writ were denied. The notice of appeal from that order was filed May 1, 1959.

"The effect of an appeal is to remove from the jurisdiction of the trial court the subject matter of the judgment or order appealed from, and it therefore has no power to vacate or set it aside." (People v. Helsley, 41 Cal. App. 2d 935, 939 [108 P. 2d 97].)

There was as noted an appeal pending from the judgment at the time the motion to set it aside was heard. If the motion is construed as a petition for a writ of habeas corpus in the alternative then an appeal therefrom is of no avail to the defendant because no appeal lies by the petition, from an order of the superior court denying a writ of habeas corpus. (People v. Ryan, 118 Cal. App. 2d 144, 149 [257 P. 2d 474].)

It is stated in People v. Robinson, 43 Cal. 2d 143, 145 [271 P. 2d 872]: "While under the 1951 amendment an order granting probation is expressly designated a 'final judgment' for the purpose of appeal (People v. Haeussler, 41 Cal. 2d 252, 254 [260 P. 2d 8]; People v. Brown, 114 Cal. App. 2d 52, 53 [249 P. 2d 595]; People v. Sumner, 117 Cal. App. 2d 40 [254

P. 2d 598]), a subsequent order revoking probation does not thereby become an 'order made after judgment, affecting the substantial rights of the party' and so appealable. (Pen. Code, §1237, subd. 3.) To hold otherwise would give the 1951 amendment greater scope than its language would reasonably support in its limited extension of a defendant's right to appeal from a theretofore nonappealable order. (3 Cal. Jur. 2d, §86, p. 536.) Rather, it would appear that upon entry of judgment in a case following the order revoking probation, the latter order does not gain any added stature by reason of the 1951 amendment because made after the order granting probation but it remains, as before, an intermediate order reviewable on appeal from the judgment. (People v. Boyce, 99 Cal. App. 2d 439, 442 [221 P. 2d 1011].) Of course, an order revoking probation made *after* entry of judgment is appealable within the express terms of subdivision 3, section 1237, of the Penal Code. (People v. Martin, 58 Cal. App. 2d 677, 678 [137 P. 2d 468].)"

It is clear that the probation in question was revoked on December 16, 1958, well within the unexpired time limit.

We find no error in the record. The judgment of conviction is affirmed.

The attempted appeal from the order revoking probation is dismissed.

The attempted appeal from the order denying the motion to set aside the judgment is dismissed.

Wood, *P. J.*, and Lillie, *J.*, concurred.